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In the Supreme Court of the United States

OCTOBER TERM, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Environmental Protection Agency's determination that visibility impairment in Grand Canyon National Park is "reasonably attributable" to the Navajo Generating Station, a major coal-fired power plant located near the Park.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2711-2740) is reported at 990 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1993. The petition for a writ of certiorari was filed on June 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sought review of regulations issued by the Environmental Protection Agency (EPA) under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* 56 Fed. Reg. 50,172 (1991). Those regulations were designed to remedy visibility impairment in the Grand Canyon National Park (Park), which EPA found to be attributable to the Navajo Generating Station (Navajo or NGS), a major coal-fired power plant in northern Arizona located approximately 15 miles from the Park. The court of appeals upheld the regulations and denied the petition for review.

1. Congress substantially amended the CAA in 1977. As part of those amendments, Congress enacted Section 169A, 42 U.S.C. 7491, to address "visibility impairment." Section 169A(a)(1) set "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." See *Vermont* v. *Thomas*, 850 F.2d 99, 100 (2d Cir. 1988). "Mandatory class I Federal areas" are certain national parks, wildernesses and international parks described in 42 U.S.C. 7472(a), which may not be designated as other than class I. 42 U.S.C. 7491(g)(5). The Park is such an area. 40 C.F.R. 81.403. Those areas are the responsibility of federal land managers such as the Department of the Interior (DOI). 42 U.S.C. 7602(i). "[V]isibility impairment" "include[s] reduction in visual range and atmospheric discoloration." 42 U.S.C. 7491(g)(6).

The EPA is required to issue regulations to assure "reasonable progress toward meeting the national goal," 42 U.S.C. 7491(a)(4), including requiring each State with a class I area where visibility is an important value to

revise its state implementation plan (SIP)[1] to contain "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal." 42 U.S.C. 7491(b)(2). Congress was especially concerned about visibility impairment in "areas of breathtaking panorama," including the Grand Canyon: "[A]reas such as the Grand Canyon * * * have encountered a serious problem: emissions from powerplants have cast, or threaten to cast, a pall in the atmosphere that drastically interferes with good visibility. This visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide * * * from inadequate[ly] controlled sources." H.R. Rep. No. 294, 95th Cong., 1st Sess. 203-205 (1977). Navajo was one of two power plants singled out: "'Much of this [reduced visibility] can probably be attributed to emissions from powerplants such as * * * Nava[j]o.'" *Id.* at 204 (citation omitted).

2. EPA originally promulgated regulations implementing Section 169A in 1980. See 45 Fed. Reg. 80,084 (40 C.F.R. Pt. 51, subpt. P). Those regulations called on affected States to develop SIPs that provide for, among other things, identification of any existing stationary source "which may reasonably be anticipated to * * * contribute to impairment of visibility [which] is reason-

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[1] Section 110 of the CAA, 42 U.S.C. 7410, provides a joint federal/state system for establishing and implementing air quality goals, standards and emissions limitations. States must submit to EPA for approval State Implementation Plans (SIPs) containing such measures as necessary or appropriate to meet applicable requirements in the CAA. Section 110(a)(2)(J), 42 U.S.C. 7410(a)(2)(J), directs that SIPs meet the requirements of the visibility protection provisions in Section 169A of the CAA. Section 110(c)(1), 42 U.S.C. 7410(c)(1), requires EPA to promulgate regulations setting forth a Federal Implementation Plan (FIP) when a State fails to submit a required SIP or SIP revision.

ably attributable to that existing stationary facility," 40 C.F.R. 51.302(c)(4)(i), and "measures * * * necessary to make reasonable progress toward the national goal." *Id.* § 51.302(c)(2)(i). The regulations defined "visibility impairment" as "any humanly perceptible change in visibility (visual range, contrast, coloration) from that which would have existed under natural conditions." *Id.* § 51.301(x). "Reasonably attributable" was defined as "attributable by visual observation or any other technique the State deems appropriate." *Id.* § 51.301(s). That expansive definition was designed to provide broad discretion to the States (or the Administrator of EPA in the case of a FIP) in selecting appropriate methods to attribute impairment to a source. 45 Fed. Reg. 80,094 (1980).

In the preamble to the 1980 regulations, EPA stated that it would implement Section 169A in phases. Phase I included the control of visibility impairment "that can be traced to a single existing stationary facility or small group of existing stationary facilities," 45 Fed. Reg. 80,085 (1980), also known as "reasonably attributable" impairment. EPA deferred addressing other types of impairment. Specifically, EPA deferred action on regional haze, which is "widespread, regionally homogeneous haze from a multitude of sources which impairs visibility in every direction over a large area," *ibid.*, until, among other things, "regional scale models become refined." *Id.* at 80,086.[2]

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[2] Pursuant to the 1990 CAA Amendments, EPA established the Grand Canyon Visibility Transport Commission (GCVTC), which includes eight western states and is charged with transmitting to EPA by 1995 recommendations on "the promulgation of regulations under section [169A] * * * for addressing regional haze" in the Park. 42 U.S.C. 7492(d)(2)(C). 56 Fed. Reg. 57,522 (1991); *id.* at 50,172 n.1. The GCVTC is a "long-term" complement to EPA's efforts to remedy impairment in the Park attributable to Navajo.

3. Pursuant to 40 C.F.R. 51.302(c)(1), DOI certified the existence of visibility impairment in all class I areas within its jurisdiction in the lower 48 States. 56 Fed. Reg. 50,173 (1991). DOI supplemented its certification and identified Navajo as a suspected source of reasonably attributable visibility impairment in the Park, based on photographic evidence. Docket A-89-02, II-D-8 at 2. In November 1987, acting pursuant to a consent decree requiring EPA to implement its 1980 regulations where States had failed to do so, as required by Sections 110(c) and 169A of the CAA, EPA disapproved the Arizona SIP, among other reasons, because it did not contain provisions addressing visibility impairment, and promulgated a partial visibility FIP. See 56 Fed. Reg. 50,173 (1991).

In September 1989, EPA preliminarily concluded that a significant portion of wintertime visibility impairment at the Park is reasonably attributable to Navajo,[3] and solicited public comment. 54 Fed. Reg. 36,948-36,949 (1989).

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136 Cong. Rec. S2890 (daily ed. Mar. 21, 1990). *Id.* at S3814-S3815 (daily ed. Apr. 3, 1990). The GCVTC is expected to "be especially helpful in addressing pollution sources outside the immediate vicinity of the canyon." *Id.* at S3815.

[3] Navajo is a 2250 megawatt coal-fired electric generating plant, located near Page, in northern Arizona, approximately 15 miles from the Park. 56 Fed. Reg. 50,174 (1991). Navajo emits more than 70,000 tons of uncontrolled sulfur dioxide (SO_2) per year and is the second largest single source of SO_2 in the western United States, emitting more SO_2 than is emitted in the entire Los Angeles basin. Docket A-89-02A, II-D-36 at 13. SO_2 is transformed in the atmosphere to visibility-impairing sulfate (SO_4) particles or aerosol. Salt River Project (SRP), an intervenor-respondent below, is the operator of Navajo and owns 21.7% of Navajo for its own use and benefit, and 24.3% for the use and benefit of the United States Bureau of Reclamation. The Los Angeles Department of Water & Power, the Arizona Public Service Company, the Nevada Power Company, and the Tucson Electric Power Company are the remaining owners of Navajo. 56 Fed. Reg. 50,174 & n.7 (1991).

EPA's preliminary finding was based on the draft final report from a 1987 wintertime field study, the Winter Haze Intensive Tracer Experiment (WHITEX), conducted by the Park Service, *ibid.*, that, among other things, involved the injection of a unique tracer at Navajo that "fingerprinted" Navajo's emissions when detected downwind. Pet. App. 2720. In February 1991, after reviewing additional information—including the final WHITEX report, a review of the WHITEX study by the National Academy of Sciences, preliminary results from another Park Service monitoring study that documented intense impairment below the rim of the canyon, and initial data analysis from a visibility study by SRP, the operator and a co-owner of Navajo—EPA proposed to find that certain winter visibility impairment episodes at the Park are reasonably attributable to Navajo and again solicited comment. 56 Fed. Reg. 5,173, 5,176-5,177, 5,178-5,180 (1991).[4]

After the public comment period closed, senior EPA policy officials facilitated discussions among various entities—including the Navajo owners, the State of Arizona, and environmental groups—to explore more environmentally protective and economically efficient control options. See 56 Fed. Reg. 50,176-50,177 (1991). The meetings resulted in a Memorandum of Understanding (MOU) between the Navajo owners and the environmental groups. The MOU recommended to EPA a regulatory approach that would achieve significantly more environmental benefit at much less cost than EPA's proposal. EPA published the recommended regulatory

[4] Based on the attribution proposal, EPA proposed to require a 70% continuous SO_2 emission limitation for Navajo, determined on a 30-day rolling average, phased-in between 1995 and 1999. EPA requested comment on this and three other control options, including a 90% emission limitation. 56 Fed. Reg. 5178 (1991).

approach and reopened the public comment period. 56 Fed. Reg. 38,399 (1991).

4. In October 1991, EPA published a Final Rule containing (1) EPA's final determination that certain visibility impairment episodes in the Park are reasonably attributable to Navajo, and (2) federal revisions to the visibility SIP to remedy such impairment. 56 Fed. Reg. 50,172 (1991). EPA based the attribution finding upon extensive data, studies, analyses, reports and comments in the record, which demonstrated that Navajo is a significant, and at times dominant, contributor to impairment in the Park. *Id.* at 50,177. Those included data submitted during the comment period, which confirmed photographic data from WHITEX showing that visibility below the rim of the canyon is impaired more often and to a greater degree than visibility above the rim of the canyon. *Id.* at 50,180. With respect to the measures required to remedy the attributable impairment, EPA's Final Rule was consistent with the MOU, requiring a 90% SO_2 emission reduction, and providing a greater degree of expected visibility improvement at a lower cost than that originally proposed. *Id.* at 50,177, 50,178-50,179, 50,183.

5. Petitioners sought review of the Final Rule in the United States Court of Appeals for the Ninth Circuit. The court of appeals rejected petitioners' contention that the Final Rule impermissibly regulates "regional haze," noting that while Navajo was not the sole source of visibility impairment at the Park, "EPA still has the statutory authority to address that portion of the visibility impairment problem which is, in fact, 'reasonably attributable' to" Navajo. Pet. App. 2731. The court also rejected petitioners' argument that EPA was limited to addressing visibility impairment directly traceable to polluting plumes that are noticeable by visual inspection or simple monitoring techniques. The court explained that

in promulgating a FIP under 42 U.S.C. 7410(c), EPA stands in the shoes of the defaulting State, and that EPA may therefore determine whether impairment is "reasonably attributable" to a given source not only by visual observation but also "by * * * any other technique [it] deems appropriate." Pet. App. 2732 (quoting 40 C.F.R. 51.301(s)). The court concluded that the technical scientific record compiled by EPA more than adequately supported EPA's determination that visibility impairment in the Park is "reasonably attributable" to Navajo. Pet. App. 2732, 2739-2740. Accordingly, the court denied the petition for review.

ARGUMENT

Petitioners contend that visibility impairment in the Park is not "reasonably attributable" to Navajo. The court of appeals properly construed the applicable statutory and regulatory provisions, and its decision does not conflict with any decision of this Court or any court of appeals. The court of appeals' rejection of petitioners' fact-bound arguments does not warrant further review.

1. Petitioners renew their contention that EPA acted beyond its regulatory authority because the visibility impairment in the Park is "regional haze," rather than visibility impairment "reasonably attributable" to Navajo. Pet. 11-19. That contention lacks merit. EPA relied on several qualitative and quantitative scientific analyses of extensive monitored data, which taken together presented a clear relationship between certain visibility impairment episodes in the Park and SO_2 emissions from Navajo. *E.g.*, Docket A-89-02A, II-D-29, IV-D-210, IV-D-164, II-D-24, II-B-19, IV-D-171, IV-D-381, App. H. Indeed, after reviewing only one of these studies, the National Academy of Sciences confirmed that "NGS contributed significantly to haze in" the Park, Docket A-89-02A, II-D-36 at 3, that "NGS emis-

sions significantly contributed to SO_4 aerosol and resultant haze at Hopi Point in" the Park, *id.* at 20, and that the "rate of SO_2 emissions from NGS is easily large enough to serve as the source of sulfur measured in the" Park. *Id.* at 33. The National Academy of Sciences also concluded that "if NGS emissions were controlled, then wintertime haze at [the Park] would most likely be reduced." *Id.* at 5.

Petitioners nonetheless argue that EPA is without authority to attribute visibility impairment on the basis of "sophisticated and unproven mathematical models and complex monitoring techniques," but may rely only on "visual observation or simple monitoring techniques." Pet. 14. Petitioners do not really dispute, as indeed they cannot, the court of appeals' conclusion that no such limitation can plausibly be read into the broad definition of "reasonably attributable" in the enabling regulations—a definition that specifically contemplates attributions based on visual observation "*or any other technique the State deems appropriate.*" 40 C.F.R. 51.301(s) (emphasis added). Petitioners contend instead that the court of appeals erred in upholding EPA's reliance on the definition of "reasonably attributable" in 40 C.F.R. 51.301(s) because that regulation applies only to States, and that EPA instead should have considered 40 C.F.R. 52.26(c), which in petitioners' view limits EPA's discretion in selecting attribution techniques. Pet. 5 & n.3, 11 n.10. Because petitioners failed to present their contention below, it has been waived. *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955). In any event, the federal visibility monitoring regulations at 40 C.F.R. 52.26 do not define "reasonably attributable" impairment, *id.* § 52.26(b), or contain remedial authority.[5] Aside from their obvious disagree-

[5] Because of the large number of States in need of visibility FIPs and in light of the on-going nature of the regulatory re-

ment with the result reached by EPA in this case, petitioners offer no substantial argument for failing to accord EPA's interpretation of its own regulations the "great deference" to which that interpretation is entitled. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1058-1061 (1992). Indeed, petitioners' proposed interpretation would introduce a discrepancy between the SIP and FIP authority that would be implausible as a means of implementing the statutory scheme (in which, as we have explained, SIPs and FIPs have a similar functional role).

Petitioners' argument that EPA's Phase I authority is limited to impairment that is detectable by visual observation or simple monitoring techniques also distorts the nature of SO_2 regulation under the Phase I regulations. Phase I is not limited to visual tracing. In order to trigger Phase I action under the 1980 regulations, it is necessary only that impairment "can be physically traced to a source." Docket A-89-02, II-A-1 at 6. See also

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quirements, EPA issued provisions in 40 C.F.R. Pt. 52 that functioned as federal companions to the state visibility monitoring strategy, new source review rules, and long-range strategies issued in 1980 at 40 C.F.R. Pt. 51. 54 Fed. Reg. 36,953 (1989). EPA determined that, with respect to source-attribution and remediation provisions, it would rely on its regulations in 40 C.F.R. Pt. 51, since "Arizona is the only State for which remedial Federal measures are even potentially needed at this time." 54 Fed. Reg. 36,953 (1989). EPA further reasoned that it was appropriate to interpret the references to the rights and duties of a "State" under 40 C.F.R. Pt. 51 to include the "Administrator" in the case of a FIP issued under Section 110(c)—especially since, as the court of appeals recognized (Pet. App. 2732), EPA stands in the shoes of the defaulting State when acting pursuant to Section 110(c). EPA twice solicited public comment on its interpretive view that the Administrator, like a State, may utilize whatever techniques he deems appropriate in making reasonable attribution findings. *Ibid.* See also 56 Fed. Reg. 5,189 (1991). That interpretation is plainly reasonable and, until now, has not been challenged by petitioners in any forum.

45 Fed. Reg. 80,085 (1980). That requirement was clearly met here. In any event, petitioners' claim fails even under their own theory. Contrary to petitioners' premise that SO_2 "does not cause visible plumes and cannot give rise to plume blight," Pet. 7, "sulfates can and do contribute to visible plumes and single source haze * * * [and sources] should be required to * * * reduce SO_2 emissions where improvement in visibility is anticipated." Docket A-89-02, II-A-1 at 14.

In sum, EPA's Phase I authority extends to the type of visibility impairment at issue in this case—impairment caused by SO_2 emissions actually traced to a single facility—and that authority is not extinguished because, in addition to photographic data and various basic analyses of monitored data, those emissions were attributed by relatively complex methodologies.

2. Petitioners also argue (Pet. 17-18) that EPA's application of its regulations in this case is arbitrary and capricious because it is inconsistent with prior agency interpretations of those regulations. In pressing that claim, petitioners principally rely on the preamble to a proposed regulation on attribution that in fact was not adopted in the form proposed. Pet. 18 (citing 45 Fed. Reg. 34,779 (1980)). On the contrary, in response to public comments on that proposal, EPA adopted a regulation that gives the decisionmaker wide discretion in selecting appropriate techniques on which to base a source attribution finding. See 45 Fed. Reg. 80,094 (1980).

Nor is there merit to petitioners' claim (Pet. 18) that EPA's methodology in attributing visibility impairment to Navajo is inconsistent with the methods used in declining to consider the imposition of control measures for the protection of other class I areas. The Park represents the only instance to date in which EPA has required emission reductions at an existing source to remedy attributable impairment. Nevertheless, EPA

has relied on a wide range of techniques in deciding not to require further analysis with respect to other class I areas. See, *e.g.*, 53 Fed. Reg. 35,956, 35,957-35,959 (1988) (time lapse photography and modeling for Voyageurs National Park, Minnesota; emissions inventory analysis and photographic data for Saguaro Wilderness, Arizona; modeling analysis predicting potential impacts at the Roosevelt Campobello International Park near New Brunswick, Canada). Here, a potential problem affecting the Park was initially uncovered by photographic data. Docket A-89-02, II-D-8 at 2. When EPA undertook a more detailed and thorough source-attribution analysis, its decisionmaking involved consideration of a complete set of monitoring data and detailed analyses of those data. Those procedures were in no sense "inconsistent" with those employed in declining to proceed with further analysis of visibility impairment in other class I areas.[6]

Finally, there is no merit to petitioners' contention (Pet. 12-21) that the decision below "contradicts the decisions reached" in *Vermont* v. *Thomas*, *supra*, and *Maine* v. *Thomas*, 874 F.2d 883 (1st Cir. 1989). In the *Vermont* case, the Second Circuit upheld EPA's refusal to take action on a proposal by the State of Vermont that was designed to address regional haze in the Lye Brook Wilderness Area. *Vermont* v. *Thomas*, 850 F.2d at 101. The court did not interpret EPA's Phase I regulations, except to indicate that they did not on their face authorize regional haze measures such as those proposed by the State of Vermont. 850 F.2d at 103-104. That case therefore simply stands for the unremarkable proposition that regional haze is not within the scope of EPA's

[6] Petitioners' final argument—that the challenged regulations amount to a procedurally invalid revision of the 1980 regulations designed to address regional haze, Pet. 19-21—lacks merit because it is premised entirely upon the erroneous supposition that EPA acted beyond its Phase I authority in regulating haze in the Park.

Phase I regulations. The *Maine* case is even farther afield. In that case, the First Circuit affirmed a district court's decision that it lacked jurisdiction under Section 304 of the CAA, 42 U.S.C. 7604, to compel EPA to issue regional haze regulations. *Maine* v. *Thomas*, 874 F.2d at 885. The court did not address the scope of EPA's authority to regulate visibility under its 1980 regulations. Neither case casts doubt on the correctness of the conclusion reached by the court of appeals in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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